

SERVED: March 8, 1995

NTSB Order No. EA-4332

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of February, 1995

Petition of)

RICHARD J. BONK,)

for review of the denial by)
the Administrator of the)
Federal Aviation Administration)
of the issuance of an airman)
medical certificate.)

Docket SM-4134

OPINION AND ORDER

The petitioner has appealed from a written decision Administrative Law Judge William E. Fowler, Jr., served in this proceeding on September 21, 1994.¹ By that decision, the law judge granted a motion by the Administrator for dismissal of the proceeding on the ground that the petitioner, under section 67.15(e)(1)(iii) of the Federal Aviation Regulations (FAR, 14 CFR Part 67), does not qualify for a second-class medical certificate because of treatments he has received for heart disease,

¹A copy of the law judge's decision is attached.

including percutaneous transluminal coronary angioplasty.² We will deny the appeal.³

Petitioner's appeal brief does not challenge the law judge's conclusion that no useful purpose would be served by holding a hearing on a certificate denial for an individual who had the cardiovascular history that the Administrator detailed in his motion to dismiss the petitioner's case. In other words, the petitioner does not argue that the law judge could not properly grant a motion to dismiss on the basis of uncontested representations and information demonstrating the existence of a medical condition that, under the regulations, requires the denial of certification. Rather, the petitioner, who did not answer the motion to dismiss, contends on appeal that the conclusions concerning his medical condition, as established in the records on which the motion to dismiss was predicated, are erroneous and, presumably, should be ignored because he disagrees with them. We agree with the Administrator that the petitioner's

²FAR section 67.15(e)(1)(iii) specifically disqualifies from second class medical certification an individual who has an "established medical history or clinical diagnosis of...coronary heart disease that has required treatment...."

³The Administrator has filed a reply brief opposing the appeal. In addition, he has filed a motion to strike a document, styled an "Appeal Brief," that petitioner submitted after serving a document entitled a "Notice of Appeal & Brief." Although the latter document is similar in content to the earlier, timely filing, we agree with the Administrator that it should be stricken from the record, not just because it is an unauthorized document (see Section 821.48(e) of the Board's Rules of Practice, 49 CFR Part 821), but also because it was not filed within the time allowed for perfecting an appeal. See 49 CFR § 821.48(a).

failure before the law judge to dispute the medical facts alleged in the motion to dismiss precludes his belated effort to do so on appeal to the Board.

The Administrator's motion to dismiss in effect obligated the petitioner to identify any legal or factual matter he believed warranted the denial of the motion. Since he did not respond to the motion, the law judge reasonably concluded that there was no evidentiary controversy whose resolution required a hearing. The petitioner has not offered any explanation for his failure to present any objections to the motion at the hearing level, and, as suggested above, he has not argued here that the law judge's decision reflects any errors based on the record before him.

In light of the foregoing, we must conclude that the petitioner waived his right to contest the factual predicate for the Administrator's certificate denial. The Board will not, on appeal, entertain new evidence or attempt to resolve factual conflicts that could have been, but were not, litigated before the law judge. Since the petitioner raises no other matter for our review, his appeal from the law judge's order must be denied.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petitioner's appeal is denied, and
2. The September 21, 1994 order of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIT, Member of the Board, concurred in the above order.